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Locked out: *Locke v. Davey* and the Broken Promise of Equal Access

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"Let there be no doubt: This case is about discrimination against a religious minority."[1]

"[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[2]

This Article is about two broken promises made to Joshua Davey by his government: one a promise of equal educational opportunity and the other a promise of religious liberty and equal access to forums for speech and expression created by government.

Even a young child knows that promises made by those who wield power and authority over the promisee should be kept. However, the promises of equal regard made to Joshua Davey by the State of Washington and the Supreme Court of the United States were broken. Davey was stigmatized and singled out for discriminatory treatment—by the State of Washington and with the imprimatur of the U.S. Supreme Court—solely because his chosen major, in an otherwise permitted course of study, was being taught by his college professors from a viewpoint that was "devotional in nature or designed to induce religious faith."[3] Moreover, this suppression of disfavored ideas occurred in the university, a place the Court has identified as "a traditional sphere of free expression . . . fundamental to the functioning of our society."[4]

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[*] Sherman S. Welpton, Jr., Professor of Law, University of Nebraska College of Law; I would like to thank Michael Liskow for organizing this Law and Religion Symposium, Casey Duncan for excellent research assistance, and John Tuskey and Michael McConnell for their generous help. This Article is dedicated to my wife and best friend, Kelly Duncan: "If you needed me, I would come to you, I'd swim the seas for to ease your pain."—Townes Van Zandt

[1] Locke v. Davey, 540 U.S. 712, 733 (2004) (Scalia, J., dissenting).

[2] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)) (alteration in original).

[3] *Davey*, 540 U.S. at 716 (quoting Brief of Petitioner-Appellant at 6, *Davey*, 540 U.S. 712 (No. 02-1315), 2003 WL 21715040).

[4] Rust v. Sullivan, 500 U.S. 173, 200 (1991).

This Article seeks to determine whether the First Amendment's protection of equal access to forums for speech and expression created by government is violated by a scholarship program that can be used to fund any course of study except "devotional theology."[5]

INTRODUCTION

On September 28, 1999, Washington Governor Gary Locke wrote a letter to Joshua Davey congratulating Davey on his selection as a recipient of a Promise Scholarship.[6] Locke praised Davey for his "outstanding academic achievements,"[7] expressed enthusiasm about the young man's "promising future,"[8] and explained why government support of college education is essential to "meet the challenges,"[9] of life in the twenty-first century:

> Education is the great equalizer in our society. Regardless of gender, race, ethnicity or income, a quality education places all of us on a more level playing field. I know this from personal experience. I was born into an immigrant family and spent the first six years of my life in public housing. Like you, I worked hard in high school and graduated with honors. I attended college and then law school. My education contributed greatly to my success, and I am personally committed to providing the best possible educational opportunities for the young people of the state of Washington.[10]

In light of what happened to Davey when he attempted to use his Promise Scholarship to pursue his chosen course of study, Governor Locke's paean to education as the "great equalizer"[11] seems almost cruelly ironic.

The State of Washington created the Promise Scholarship Program to assist academically gifted students from low and moderate income families with the expenses of attending college.[12] A Promise Scholarship was awarded to students who graduated near the top of their class from a public or private high school located in the State of Washington, whose family income was less than 135% of the state's median, and who enrolled at least half-time in an accredited college or university located in the State of Washington.[13] Since Davey met all of these religiously-neutral requirements, he was awarded a Prom-

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[5] *Davey*, 540 U.S. at 717.

[6] *See* Letter from Governor Gary Locke to Joshua Davey, Sept. 28, 1999, *reprinted in* Joint Appendix at 55, *Davey*, 540 U.S. 712 (No. 02-1315), 2003 WL 21911178.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 56.

[11] *Id.*

[12] Locke v. Davey, 540 U.S. 712, 715–16 (2004).

[13] *Id.* at 716.

ise Scholarship worth $1,125 for his first year of college and $1,542 for his second year.[14] Promise Scholarships "are funded through the State's general fund" and can be used to pay "any education-related expense, including room and board."[15] However, when Davey enrolled in Northwest College[16] and attempted to use his Promise Scholarship to defray his educational expenses, he discovered that there was one additional requirement designed to protect the "liberty of conscience"[17] of Washington taxpayers who oppose supporting the education of prospective members of the clergy even under a generally-applicable scholarship program. This final requirement, which, unlike the others, was most certainly not religiously-neutral, stated that Promise Scholars could use their scholarships to pursue a degree in any course of study except "a devotional theology degree."[18] Davey could have majored in religious studies at the University of Washington and studied religion "from a historical and strictly scholarly point of view,"[19] but he could not major in the same course of study at Northwest College because the Northwest faculty taught the courses from a "devotional" perspective.

Davey, who had planned to pursue a double major at Northwest College in "pastoral ministries and business management/administration,"[20] was informed by Northwest's financial aid director that to receive his Promise Scholarship funds he would be required to "certify in writing that he was not pursuing" [21] a degree in devotional theology at the college. Since he had no intention of foregoing an edu-

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[14] *Id.* The scholarship is awarded for the first year of postsecondary education and is renewable for one year.

[15] *Id.*

[16] *Id.* at 717 (stating that Davey enrolled at Northwest College, which is a private Christian college that is eligible under the Promise Scholarship Program).

[17] *Id.* at 722 (citing F. LAMBERT, THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA 188 (2003)).

[18] *Davey*, 540 U.S. at 717. The exclusion of devotional theology majors is required by the Washington State Constitution. *Id.* at 719 ("No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." (quoting WASH. CONST. art. I, § 11)).

[19] Declaration of Eugene Webb, Aug. 9, 2000, *reprinted in* Joint Appendix, *supra* note 6, at 85. Dr. Webb is a Professor at the University of Washington who teaches religion classes at the University. Dr. Webb was very emphatic in stating that "[n]one of our courses are devotional in nature or designed to induce religious faith." *Id.* at 84. Indeed, he stated:

> [W]hen students raise questions about the truth or ultimate reality of religious ideas, I remind them that our concern in these courses is not with truth but only with the meanings of the ideas—that is, the various ways in which they have been interpreted and reinterpreted over time in the lives of religious communities.

Id. In other words, at the University of Washington, religion is studied from an agnostic viewpoint "as an aspect of the general intellectual and cultural history of societies and civilizations." *Id.*

[20] *Davey*, 540 U.S. at 717.

[21] *Id.*

cation in pastoral ministries, he refused to sign the certification form, and, as a result, his Promise Scholarship was lost and he received no funds.[22]

Davey sued in federal court claiming that the rule denying Promise Scholarship funds to students who declare a major in devotional theology is unconstitutional religious and viewpoint discrimination under the Free Exercise and Free Speech Clauses of the U.S. Constitution.[23] The federal district court ruled against Davey, but a divided panel of the Ninth Circuit Court of Appeals reversed and held that the State of Washington violated the Free Exercise Clause by targeting devotional theology majors such as Davey for exclusion from the Promise Scholarship Program.[24] The Supreme Court granted certiorari,[25] reversed the Ninth Circuit, and held that a narrow exclusion denying state funding for "vocational religious instruction"[26] does not violate the free exercise rights of students, such as Davey,[27] who are pursuing "religious instruction that will prepare [them] for the ministry."[28]

Although the only issue before the Court in *Davey* was the free exercise issue, Chief Justice Rehnquist's majority opinion contains dictum that rejects, by conclusory assertion, Davey's argument "that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech."[29] The purpose of this Article is to focus on Footnote Three of the Rehnquist opinion in *Davey* and this important dictum concerning the Free Speech Clause and viewpoint restrictions contained in scholarship programs funding the post-secondary education of scholars like Joshua Davey. Although the Court's dictum in *Davey* was nearly devoid of reasoning, I will attempt to fill that void by

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[22] *Id.*

[23] *Id.* at 718 ("He argued the denial of his scholarship based on his decision to pursue a theology degree violated, *inter alia*, the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, as incorporated by the Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment.").

[24] *Id.* (discussing the conclusions drawn by the Ninth Circuit); *see also* Davey v. Locke, 299 F.3d 748, 757–60 (9th Cir. 2002) (finding that Washington's Promise Scholarship Program was unconstitutional).

[25] *Davey*, 299 F.3d 748, *cert. granted*, 538 U.S. 1031 (2003) (granting certiorari only on the question of whether the Free Exercise Clause mandates that the State of Washington fund religious instruction if it provides scholarships for secular college instruction); *accord Davey*, 540 U.S. at 719 (identifying the issue presented as whether Washington can deny funds to students preparing for the ministry without violating the Free Exercise Clause).

[26] *Davey*, 540 U.S. at 725.

[27] *Id.* at 719.

[28] *Id.*; *see also id.* at 725 ("Given the historic and substantial state interest at issue, we therefore cannot conclude that the denial of funding for vocational religious instruction alone is inherently constitutionally suspect.").

[29] *Id.* at 720 n.3 (asserting that "the Promise Scholarship Program is not a forum for speech," making the Court's speech forum precedents inapplicable).

analyzing Davey's free speech argument against the Promise Scholarship Program's exclusion of students pursuing a degree in devotional theology.

In *Davey*, a Promise Scholarship could be used by the recipient to fund any course of study except a major in "devotional theology."[30] Was it reasonable for Davey to believe that this restriction constituted viewpoint discrimination by the State, striking at the core of educational free speech in "the university [which] is a traditional sphere of free expression . . . fundamental to the functioning of our society?"[31] If this does not seem to pose a serious threat to freedom of speech in academia, imagine a similar state scholarship program that can be used to fund any course of study except "gender studies from a feminist perspective." Does this twist better highlight free speech concerns? Should the cases be decided the same? Or should one come out in favor of the restriction and the other in favor of free speech? If the latter, how would you defend treating the cases differently? Does one case involve viewpoint discrimination and the other merely exclusion of a particular subject matter? Does the scholarship program create a public forum for speech in one case, but not in the other?[32] Suppose a state imposes an annual tax of $500 on students pursuing a college degree in theology from a devotional perspective or gender studies from a feminist perspective. Is this tax on certain educational perspectives unconstitutional viewpoint discrimination? If so, how is this different from discriminatory exclusions from scholarships? These are only some of the questions that should have been—but were not—considered by the Court in *Davey*, and they are questions that I hope to address in this Article.

I. THE FREE EXERCISE ISSUE: A BRIEF DETOUR

A. What the Establishment Clause Permits and What the Free Exercise Clause Requires

In order to understand what was at stake in *Davey*, observe first that the Court strongly declared "there is *no doubt* that the State could, consistent with the Federal Constitution, permit Promise

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[30] *Id.* at 717.

[31] Rust v. Sullivan, 500 U.S. 173, 200 (1991).

[32] Other variations on the hypothetical posed in the text might include a scholarship that could be used to fund any major except "evolutionary biology" or "queer studies." Are these restrictions permissible under the First Amendment? Or, even better, consider a scholarship program that takes a 180 degree turn from the one in *Davey* and permits funding for any major "except non-devotional theology." Does this restriction violate the Establishment and Free Speech Clauses because it prefers "devotional" theology over "non-devotional" theology? Is not this exactly the claim Joshua Davey made (in reverse) in *Davey*?

Scholars to pursue a degree in devotional theology."[33] Religious liberty has come a long way since the triumph of strict separationism and the "no-aid" principle in *Lemon v. Kurtzman*,[34] and, under cases like *Witters v. Washington Department of Services for the Blind*[35] and *Zelman v. Simmons-Harris*,[36] it is now clear that generally applicable and nondiscriminatory scholarships and vouchers do not violate the Establishment Clause when recipients, exercising "independent and private choice,"[37] employ them to pay for religious education at private religious schools.

Davey is not a case about whether the Establishment Clause permits states to provide scholarships for both religious and secular higher education. Nondiscriminatory scholarships covering both secular and religious schools are clearly permitted under the U.S. Constitution.

Instead, Joshua Davey asked the Court to hold that the Promise Scholarship Program violated the Free Exercise Clause because it discriminated against devotional theology majors by explicitly excluding them from funding available to all other courses of study.[38] In other words, "[t]he holding in *Locke v. Davey* concerns what the state *must* fund."[39]

Davey's free exercise argument was a strong one that should have prevailed under the Supreme Court's recent jurisprudence. In its 1990 decision in *Employment Division v. Smith*,[40] the Supreme Court held that the Free Exercise Clause does not protect religious liberty against restrictive laws that are both neutral and generally applicable. However, as the Court expressly emphasized in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,[41] "[a] law burdening religious practice that is not neutral or not of general application must undergo the most

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[33] *Davey*, 540 U.S. at 719 (emphasis added).

[34] 403 U.S. 602 (1971). For a discussion of the "no aid" principle, which prohibited the use of tax funds to support religious activities or institutions, see Douglas Laycock, Commentary, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 162–67 (2004) (providing an overview of the history of the "no aid" principle).

[35] 474 U.S. 481 (1986).

[36] 536 U.S. 639 (2002).

[37] *Davey*, 540 U.S. at 719. One commentator refers to this vindication of neutrality and individual educational choice as springing from the Court's "constitutional theory of religious tolerance." Susanna Dokupil, *Function Follows Form:* Locke v. Davey*'s Unnecessary Parsing*, 2003–2004 CATO SUP. CT. REV. 327, 335.

[38] *See Davey*, 540 U.S. at 720 (arguing that "the program is presumptively unconstitutional because it is not facially neutral with respect to religion").

[39] Laycock, *supra* note 34, at 171 (emphasis added).

[40] 494 U.S. 872 (1990).

[41] 508 U.S. 520 (1993).

rigorous of scrutiny."[42] Moreover, the Court in *Lukumi* clearly stated that "the minimum requirement of neutrality is that a law not discriminate on its face."[43] Since the Promise Scholarship Program facially targeted devotional theology majors for discriminatory exclusion from funding, Davey's free exercise claim should have been an easy and certain winner under *Smith* and *Lukumi.* Justice Scalia, the author of the majority opinion in *Smith,* certainly thought so.[44] However, by a surprising vote of 7–2, the Supreme Court rejected Davey's free exercise claim and upheld Washington's decision to exclude devotional theology majors from its Promise Scholarship Program.[45]

Chief Justice Rehnquist's majority opinion, at least on its face, is a very narrow one limited essentially to the facts of the case—to "the Promise Scholarship Program as currently operated by the State of Washington."[46] Although the opinion is mortally under-reasoned, it appears to be based on three separate factors: the "relatively minor burden"[47] the restriction placed on Promise Scholars such as Davey, the State's interest in hewing to historical tradition against taxpayer funds being used to subsidize "religious education for the ministry,"[48] and the Court's desire to create room for "play in the joints" between what the Establishment Clause permits and what the Free Exercise Clause requires.[49]

Although the primary focus of this Article is on the free speech—not the free exercise—issue in *Davey,* I will first briefly discuss the Court's unpersuasive attempt to explain its rejection of Davey's religious liberty claim.

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[42] *Id.* at 546. *See generally* Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith, Lukumi *and the General Applicability Requirement,* 3 U. PA. J. CONST. L. 850 (2001) (analyzing the general applicability standard).

[43] *Lukumi,* 508 U.S. at 533.

[44] *See* Locke v. Davey, 540 U.S. 712, 726–27 (2004) (Scalia, J., dissenting) (arguing that the Promise Scholarship Program is facially discriminatory toward religion and that the majority's holding is irreconcilable with previous decisions). Professor Laycock has summarized the logic of Davey's powerful argument as follows: "[I]f funding is permitted and discrimination is forbidden, it seemed to follow that a discriminatory refusal to fund is forbidden." Laycock, *supra* note 34, at 156.

[45] *See Davey,* 540 U.S. at 725 (finding the Promise Scholarship Program "as currently operated by the State of Washington" not "inherently constitutionally suspect" and determining the State's interest in not funding the pursuit of devotional theology degrees to outweigh the "relatively minor burden" on Promise Scholars).

[46] *Id.* Susanna Dokupil reads *Davey* as upholding the state's restrictions "on the narrowest possible grounds, effectively confining [the holding in *Davey*] to its facts." Dokupil, *supra* note 37, at 334.

[47] *Davey,* 540 U.S. at 725.

[48] *Id.* at 721. The Washington Supreme Court has explained that its "state constitution prohibits the taxpayers from being put in the position of paying for the religious instruction of aspirants to the clergy with whose religious views they may disagree." Witters v. State Comm'n for the Blind, 771 P.2d 1119, 1120 (Wash. 1989).

[49] *Davey,* 540 U.S. at 719.

B. *Free Exercise Burdens and Scholarships for Clergy*

Davey claimed that his free exercise rights were violated by the Promise Scholarship Program because it was "not facially neutral with respect to religion" and was, therefore, presumptively unconstitutional under *Lukumi*.[50] However, the Court slipped quickly away from *Lukumi* by noting that in *Davey* the law's "disfavor of religion" did not involve criminal or civil penalties but rather was "of a far milder kind."[51] Incredibly, Chief Justice Rehnquist asserted that the state did not even require Promise Scholars such as Davey "to choose between their religious beliefs and receiving a government benefit."[52] Rather, said the Court, Washington had "merely chosen not to fund a distinct category of instruction."[53]

Any reasonable observer of the facts in *Davey* must respond with incredulity to Rehnquist's highly selective and conclusory description of the burden on religious liberty imposed by the Promise Scholarship's exclusion of otherwise eligible students who chose to major in devotional theology. The state undoubtedly targeted this tiny minority of scholars and forced them to choose between a large government benefit designed to create a "more level playing field" of educational opportunity[54] and the free exercise of their religious beliefs. When Joshua Davey chose to follow his religious beliefs by declaring a major in pastoral ministries at Northwest College, the State of Washington penalized him by taking away his scholarship and the educational funds he otherwise would have received. Under *Sherbert v. Verner*[55] and its progeny,[56] when a state conditions a generally available governmental benefit[57]—such as unemployment compensation or

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[50] *Id.* at 720.

[51] *Id.*

[52] *Id.* at 720–21.

[53] *Id.* at 721.

[54] Letter from Governor Gary Locke to Joshua Davey, *supra* note 6, at 56.

[55] 374 U.S. 398 (1963).

[56] *See* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829, 832–33 (1989) (holding that denial of unemployment benefits to a man who refused to accept a position that required him to work on Sundays was a violation of his right to free exercise, even though the man's religious convictions were the product of his personal religious beliefs and not of any established religious denomination); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 146 (1987) (finding an undue burden on the right to free exercise in the denial of unemployment benefits to a woman who was terminated because her religious beliefs precluded her from working certain scheduled hours); Thomas v. Review Bd., 450 U.S. 707, 720 (1981) (holding that state's denial of unemployment benefits to a man who terminated his employment because his religion forbids his involvement in the production of armaments placed an undue burden on the right to free exercise of religion).

[57] *See Davey*, 540 U.S. at 727 (Scalia, J., dissenting) (noting that the Promise Scholarship Program is "a generally available public benefit" that was awarded to all students who met objective standards involving "academic performance, income, and attendance at an accredited school"); Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L.

scholarship funds—on the recipient's willingness to perform some act that her religion counsels against, or to refrain from some act that her religion motivates her to do, there exists a constitutionally sufficient burden on the free exercise of religion.[58]

In his dissent in *Davey*, Justice Scalia argued persuasively that the State of Washington had, in effect, "imposed a special tax" on devotional theology majors by "carv[ing] out a solitary . . . exclusion" from generally available educational benefits.[59] Similarly, the Court in *Sherbert* held it was "clear" that a burden on free exercise was imposed by the State of South Carolina when it forced a Sabbatarian, such as Sherbert, to choose between unemployment benefits and following the precepts of her religion by refraining from work on Saturday.[60] The Court said that the condition was coercive and amounted to "the same kind of burden upon the free exercise of religion as would a fine imposed" on Saturday worship.[61]

What makes the burden on Davey even more substantial is the stigmatic injury of being singled out as an outsider, as one who is deemed unworthy by his government of receiving a scholarship made available to every other student pursuing any other program of study.[62] Indeed, after *Smith* and *Lukumi* "converted the right to free exercise of religion into some kind of non-discrimination right,"[63] the kind of burden that ought to matter most is the harm caused by unequal access to a generally available benefit determined "solely on the basis of religion."[64] Even a tiny economic harm is magnified greatly when a small minority is singled out on the basis of religion and de-

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REV. 933, 977–82 (1989) (explaining that "undue burden" cases support the notion that the right to free exercise comports with the modern view of a universal or generally-available government benefit as an "entitlement" or property right).

[58] *See Sherbert*, 374 U.S. at 403–04 (opining that a statute which burdens the practice of religion—even indirectly by means of a disqualification for government benefits—is unconstitutional). The burden consists of the coercive pressure on students, like Davey, to forego pursuing a degree in devotional theology in order to receive scholarship funds. *See* Thomas C. Berg & Douglas Laycock, *The Mistakes in* Locke v. Davey *and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 235 (2004) (noting that "[d]iscriminatory funding is always the worst policy, because it pressures citizens to adapt their own religious choices to the state's favored categories").

[59] *Davey*, 540 U.S. at 727 (Scalia, J., dissenting).

[60] *Sherbert*, 374 U.S. at 403.

[61] *Id.* at 404.

[62] By targeting devotional theology majors for discriminatory exclusion from a scholarship program available to all others, the State of Washington sends a message to students like Davey "that they are outsiders, not full members of the political community." Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

[63] Laycock, *supra* note 34, at 171; *see* Duncan, *supra* note 42, at 880 (noting that the two cases "transformed the Free Exercise Clause from a liberty rule . . . to an equality rule").

[64] *Davey*, 540 U.S. at 727 (Scalia, J., dissenting).

nied equal treatment.[65] Davey's lost scholarship, of course, was much more than a small economic harm. It was a substantial sum of money designed to create a "more level playing field" by making higher education affordable for students from low and moderate income families.[66]

The only socially redeeming quality of the Court's opinion in *Davey* is its extreme narrowness. The Rehnquist opinion seemed to say that Davey was asking for too much too soon. His lawsuit asked the Court to hold "that what had long been constitutionally prohibited, and had only just been constitutionally permitted, was now constitutionally required."[67] The Court held that at least for the present there must be room for "play in the joints"[68] for the states to hew to historical traditions against using tax funds to pay for the education and support of the clergy.[69] The Court went out of its way to emphasize that "the Promise Scholarship Program goes a long way toward including religion in its benefits"[70] by permitting students to attend "pervasively religious schools" and to take "devotional theology courses" so long as they don't seek to prepare for a clerical vocation by choosing a major in devotional theology.[71]

In the fullness of time, *Davey* will probably be understood as a narrow and temporary pause on the Court's inexorable journey toward neutrality under the Constitution's religion clauses. There is no doubt that the Establishment Clause permits devotional theology majors to receive neutral educational benefits,[72] and there should be no doubt that the Free Exercise Clause prohibits states from targeting theology students for discriminatory exclusion. As Justice Scalia put it, "[i]f the Religion Clauses demand neutrality, we must enforce them, in hard cases as well as easy ones."[73]

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[65] *See, e.g., id.* at 731 ("The indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial.").

[66] *See supra* note 10 and accompanying text; *see also Davey*, 540 U.S. at 731 (Scalia, J., dissenting) ("[W]hen the State exacts a financial penalty of almost $3,000 for religious exercise—whether by tax or by forfeiture of an otherwise available benefit—religious practice is anything *but* free.").

[67] Laycock, *supra* note 34, at 158.

[68] *Davey*, 540 U.S. at 719.

[69] *See id.* at 721–23 (stressing that the Program was merely making a distinction between vocational "education for the ministry" and "other callings or professions").

[70] *Id.* at 724.

[71] *Id.* at 724–25.

[72] *See id.* at 729 (Scalia, J., dissenting) ("Perhaps some formally neutral public benefits programs are so gerrymandered and devoid of plausible secular purpose that they might raise specters of state aid to religion, but an evenhanded Promise Scholarship Program is not among them."); *supra* notes 33–37 and accompanying text.

[73] *Davey*, 540 U.S. at 728 (Scalia, J., dissenting).

II. FOOTNOTE THREE: FREE SPEECH AND VIEWPOINT DISCRIMINATION

The only issue directly before the Court in *Davey* was whether the discriminatory exclusion of devotional theology majors from the Promise Scholarship Program violated the Free Exercise Clause.[74] However, Davey also contended that the restriction violated the Free Speech Clause because it discriminated against educational speech on the basis of viewpoint.[75]

In brief and largely unreasoned dictum, the Court rejected Davey's free speech claim because "the Promise Scholarship Program is not a forum for speech."[76] The Court explained this conclusory assertion with yet another unsupported conclusion—the Scholarship Program was not a speech forum because its purpose was merely to help low- and moderate-income students pay for college, not to "encourage a diversity of views from private speakers."[77] In other words, higher education is a product or a service, like low-income housing, surplus cheese, or health care, not an open and diverse marketplace of ideas.

If Chief Justice Rehnquist's dictum in *Davey* hardens into Free Speech Clause doctrine, it is not only supporters of equal treatment for religious education who ought to be concerned. The Court has made clear that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[78] Moreover, the Court's dictum in *Davey* was based upon its conclusion that a scholarship program is not a forum for private expression, thus the Free Speech Clause does not apply even when exclusions from educational benefits are based upon the viewpoint of the student's chosen major.

To put this in sharper focus, consider three different scholarship programs, each with its own unique exclusion:

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[74] *See id.* at 719 (majority opinion).

[75] *See id.* at 720 n.3 (noting that *Davey* was relying on *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995) for his free speech argument).

[76] *Id.*

[77] *Id.* The following quotation constitutes the entirety of Rehnquist's dictum on the free speech issue:

> Davey, relying on *Rosenberger v. Rector and Visitors of Univ. Of Va.*, 515 U.S. 819 (1995), contends that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech. But the Promise Scholarship Program is not a forum for speech. The purpose of the Promise Scholarship Program is to assist students from low- and middle-income families with the cost of postsecondary education, not to "'encourage a diversity of views from private speakers.'" *United States v. American Library Assn., Inc.*, 539 U.S. 194, 206 (2003) (plurality opinion) (quoting *Rosenberger*, *supra*, at 834). Our cases dealing with speech forums are simply inapplicable. *See American Library Assn.*, *supra*; *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 805 (1985).

Id.

[78] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).

Program One

Program One is the Promise Scholarship Program from *Davey*, a generally applicable scholarship that can be used to fund any course of study except "devotional theology."

Program Two

Program Two is also a generally applicable scholarship, but the restriction is different—this scholarship can be used to fund any course of study except "gender studies from a feminist perspective."

Program Three

Program Three is like the others except it can be used to fund any course of study except "political science from a socialist perspective."

If the dictum in Footnote Three of *Davey* controls, the Free Speech Clause does not apply in any of these cases, because a scholarship program is merely the delivery of a product or service, and is not designed to create a forum or to encourage a diversity of views from private speakers. Moreover, since the Free Speech Clause provides the same protection to private religious speech and private secular speech, there is no reason to think the forum rule should mean one thing when applied to Program One and something else when applied to Programs Two and Three.

A. The Categories of Public and Nonpublic Fora

The Supreme Court has classified government property opened to private expression as fitting into one of three categories of fora: such government property will be classified as either a traditional public forum, a designated public forum, or a nonpublic forum. A traditional public forum is a place, such as a park or a public street, that has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[79] A second category of forum is the designated or limited public forum. Such a public forum is created when government purposefully opens its property for public expression by part or all of

[79] Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

the public.[80] Finally, a nonpublic forum exists when government opens its property for certain communicative purposes, but does not intend to create a designated public forum.[81]

In the case of a limited public forum, government may not exclude "a speaker who falls within the class to which a designated public forum is made generally available,"[82] nor "may it discriminate against speech on the basis of its viewpoint."[83] In the case of a nonpublic forum, the government may restrict access "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view."[84] Significantly, although the government may exclude speech from even a limited public forum on the basis of subject matter,[85] viewpoint discrimination is prohibited in both public and nonpublic fora.

B. Scholarships as Fora for Private Speech

Chief Justice Rehnquist and the majority in *Davey* said that the Promise Scholarship Program did not create a forum for speech because it was not intended by the State of Washington "to encourage a diversity of views from private speakers."[86] What did he mean by this?

Did he mean that the Scholarship Program was designed to fund government speech, as opposed to private speech? Did he mean that education is not really speech, perhaps because he views higher education as merely a credentialing service designed to help young Dil-

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[80] *See id.* (explaining the second category of public property "which the State has opened for use by the public as a place for expressive activity"); *see also* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) (discussing the creation of a designated public forum by "purposeful governmental action").

[81] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 803 (1995) (highlighting the Court's past decisions regarding public forums). The court in *Cornelius* explains:

> Not every instrumentality used for communication, however, is a traditional public forum or a public forum by designation. . . . We will not find that a public forum has been created in the face of clear evidence of a contrary intent, . . . nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity.

Id.

[82] *See Forbes*, 523 U.S. at 677 (explaining that such governmental action would then be subject to strict scrutiny).

[83] Rosenberger v. Regents & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995); *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106 (2001) ("The restriction must not discriminate against speech on the basis of viewpoint . . . .").

[84] *Forbes*, 523 U.S. at 677–78 (quoting *Cornelius*, 473 U.S. at 800); *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 392–93 (1993) (emphasizing that, even in a nonpublic forum, restrictions on access must be "viewpoint neutral").

[85] *See Rosenberger*, 515 U.S. at 829–30 (stating that subject matter discrimination is permissible "if it preserves the purposes" of a limited public forum, but "viewpoint discrimination . . . is presumed impermissible when directed against speech otherwise within the forum's limitations").

[86] Locke v. Davey, 540 U.S. 712, 720 n.3 (2004) (citing United States v. Am. Library Ass'n, 539 U.S. 194, 206 (2003) (plurality opinion)).

berts achieve a better place in the corporate rat race? Did he mean that accredited colleges and universities in the State of Washington do not offer Promise Scholars a "diversity of views" to select from when choosing a program of study? Or did he mean nothing at all when he pushed an important free speech issue out of his way with the brief dictum in Footnote Three?

To begin at the beginning, let's try to answer the first of these questions by analyzing whether the Promise Scholarship Program was intended to fund a diversity of private views about science, philosophy, social science, history, and literature—to name just a few of the subjects that Promise Scholars study under the Program. The reason this question is controlling is that the Court has already held, in the landmark case of *Rosenberger v. Rector & Visitors of University of Virginia*,[87] that when a state university establishes a funding program for student publications it creates a "metaphysical"[88] limited public forum and may not "discriminate against speech on the basis of its viewpoint."[89]

If the *Davey* majority had made a rational attempt to apply *Rosenberger*—instead of merely casting it aside without thoughtful analysis—it would have had no choice but to uphold Davey's free speech challenge. Indeed, Davey's First Amendment argument was stronger than Rosenberger's. The Promise Scholarship Program restricted educative speech on the basis of viewpoint in a "metaphysical" forum intended to encourage an infinitely broad spectrum of private expression at the core of the First Amendment's protection of the marketplace of ideas. *Rosenberger* cannot be distinguished from *Davey*. If it is law, then a fortiori Davey's claim is valid and Rehnquist's dictum in Footnote Three is wrong.

1. *The Metaphysical Forum in* Rosenberger

In *Rosenberger*, the University of Virginia collected mandatory "activity fees" from students for the purpose of providing "financial support for student organizations that are related to the educational purpose of the University of Virgin[i]a."[90] The University Guidelines for Student Activities Fund ("SAF") distribution provided a category of funding for "student news, information, opinion, entertainment, or academic communications media groups."[91] Fifteen student

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[87] *Rosenberger*, 515 U.S. 819.

[88] *Id.* at 830 (stating that, although a funding forum is "metaphysical" rather than "spatial or geographic," the same legal protections for speech apply).

[89] *Id.* at 829.

[90] Affidavit of Ronald J. Stump, *reprinted in* Joint Appendix at 69, *Rosenberger*, 515 U.S. 819 (No. 94-329).

[91] *Rosenberger*, 515 U.S. at 824 (citation omitted).

groups were funded under this student publications category,[92] including the *Virginia Environmental Law Journal*, the *Virginia Advocate*, and the *Journal of Law & Politics*.[93] However, funding was denied for *Wide Awake: A Christian Perspective at the University of Virginia*[94] because *Wide Awake* "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality."[95] In other words, although *Wide Awake* published articles on permissible topics,[96] the University refused SAF funding because the journal's Christian viewpoint was a "prohibited perspective."[97]

Although the expressed purpose of SAF funding was to "enhance the University environment" and to support the "educational purpose of the University,"[98] not to promote the opinions of student speakers, the Court held that the SAF funding of student journals created a limited public forum because the program "expends funds to encourage a diversity of views from private speakers."[99] The Court clearly held that the government "may not discriminate based on the viewpoint of private persons whose speech it facilitates."[100] In other words, when a program in fact provides funding to facilitate private speech from a diversity of views, a metaphysical public forum for speech is created even if the government has other goals or reasons for pursuing the funding program. Once such a forum exists, a "blatant" violation of the Free Speech Clause occurs "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject."[101]

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[92] *Id.* at 825.

[93] Joint Appendix, *supra* note 90, at 50, 64 (reprinting the school's student group budget allocations for the 1989–90 school year).

[94] Funding was sought by petitioner Ronald Rosenberger on behalf of Wide Awake Productions, a registered student organization at the University that was established to publish a journal "of philosophical and religious expression" and to communicate "a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia." *Rosenberger*, 515 U.S. at 825–27 (citations omitted).

[95] *Id.* at 827 (citation omitted).

[96] *See, e.g., id.* at 826, 831 (noting that *Wide Awake* published articles on racism, stress, crisis pregnancies, homosexuality, prayer, eating disorders, music reviews, and interviews with professors).

[97] *Id.* at 831.

[98] *Id.* at 824 (citations omitted).

[99] *Id.* at 834.

[100] *Id.*

[101] *Id.* at 829. Government may not discriminate on the basis of viewpoint in the context of a funding program if the program is "designed to facilitate private speech, not to promote a governmental message." Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 542 (2001) (holding that Congress's prohibition of local recipients of Legal Services Corporation ("LSC") funds from engaging in representation involving efforts to amend or otherwise challenge validity of existing welfare laws was impermissible viewpoint discrimination in violation of the First Amendment, even though the program does not create even a limited public forum); *see also* Stuart J. Lark, *Religious Expression, Government Funds, and the First Amendment*, 105 W. VA. L. REV. 317, 330–33

The Promise Scholarship Program in *Davey* is clearly designed to encourage Promise Scholars to choose from the infinitely broad selection of subjects, viewpoints, and courses of study that constitute the marketplace of ideas of higher education in the State of Washington. As Chief Justice Rehnquist acknowledges—in another context—in his majority opinion in *Davey*, the Promise Scholarship Program was designed to facilitate "the independent and private choice of recipients" concerning the education they wished to pursue.[102]

A college education is not merely a product or chattel like surplus cheese or prescription drugs; rather it is not only speech, but speech of the highest and purest form.[103] It is philosophy, science, history, literature, art, and, yes, even theology. It is a search for truth and knowledge by reading, writing, thinking, and debating about—and sifting through—all viewpoints, all perspectives, and all arguments on all subjects and all disciplines. It is one thing for a state to fund Cheddar, but not Muenster cheese; it is a very different thing for the state to fund theology from an agnostic, but not from a believing point of view.

As the Court itself has said so well on many occasions, because "the university is a traditional sphere of free expression . . . fundamental to the functioning of our society,"[104] the "First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom."[105] The First Amendment's "special concern"[106] for free expression on campus is deeply offended when government seeks to control educative speech "by means of conditions attached to the expenditure of Government funds;"[107] the education of our Nation's future leaders should consist of a "robust exchange of ideas" from a "multitude of tongues," not only from those voices approved by "any kind of authoritative selection."[108]

When the government discriminates on the basis of viewpoint in scholarship programs like Washington's Promise Scholarship, it se-

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(2003) (summarizing the *Velazquez* holding); F. Philip Manns, Jr., *Finding the "Free Play" Between the Free Exercise and Establishment Clauses*, 71 TENN. L. REV. 657, 682–83 (2004) (analyzing the *Velazquez* holding).

[102] Locke v. Davey, 540 U.S. 712, 719 (2004); *see also* Dokupil, *supra* note 37, at 344 (by providing scholarships "for any course of study (except one), the state has facilitated [private] expressive conduct").

[103] *See* Laycock, *supra* note 34, at 191 ("Education consists largely of the transmission and exchange of information and viewpoints[, activities that are] . . . central concerns of the First Amendment.").

[104] Rust v. Sullivan, 500 U.S. 173, 200 (1991).

[105] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[106] *Id.*

[107] *Rust*, 500 U.S. at 200.

[108] *Keyishian*, 385 U.S. at 603 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

verely distorts the marketplace of ideas in higher education. By excluding devotional theology majors from the program, "the state created an incentive for students not to pursue that major and instead to pursue a major less infused with religious teaching."[109] What is worse, this distortion of educational choice "might induce some students committed to a religion major to choose a college whose approach to the study of religion is more secular and less devotional."[110] Under the Free Speech Clause, such distortion of the educational marketplace of ideas is impermissible. Harm to intellectual freedom in the university system is "minimized when the state funds" no educational viewpoints, or when it funds all educational viewpoints "within a neutrally defined category."[111] By contrast, the policy adopted by the State of Washington distorted the expressive marketplace and undermined intellectual freedom by targeting one perspective for discriminatory exclusion.

2. *Viewpoint Discrimination*

Although government scholarship programs may permissibly select certain subjects for favorable treatment, they may not discriminate against private educational choices on the basis of viewpoint. For example, the state may decide to create a scholarship program for students who major in political science, but may not withhold funding from students who major in political science from a socialist perspective.[112]

Viewpoint discrimination strikes at the core of "the most basic values underlying the First Amendment."[113] As Marjorie Heins has stated:

> These values include the right to think, believe, and speak freely, the fostering of intellectual and spiritual growth, and the free exchange of ideas necessary to a properly functioning democracy. Government action that suppresses or burdens speech on the basis of its viewpoint threatens all of these values by skewing public debate, retarding democratic change, depriving people of ideas and artistic experiences that could contribute to their growth, and otherwise constricting human liberty.[114]

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[109] Berg & Laycock, *supra* note 58, at 235.

[110] *Id.* (suggesting that *Davey* creates an incentive for colleges "to tip their religion courses from the devotional toward the secular" to ensure that their students are not disqualified from receiving Promise Scholarships).

[111] *Id.*

[112] *See supra* note 101 and accompanying text; *see also* Rosenberger v. Regents & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[113] Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 100 (1996).

[114] *Id.* (citations omitted).

In *Rosenberger*, Justice Kennedy's opinion for the Court emphasized that "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant."[115]

Although the precise line between permissible subject matter and impermissible viewpoint restrictions on speech is not always easy to locate,[116] the restrictions in *Davey*, like those in *Rosenberger*, clearly constitute viewpoint discrimination. This is because the government has classified religion or theology as permissible subjects for funding,[117] but in one case "select[ed] for disfavored treatment"[118] student journals with "religious editorial viewpoints"[119] and in the other case disfavored the study of theology from a devotional perspective.[120] This viewpoint discrimination[121] is an egregious subset of subject matter discrimination, and it is "presumptively unconstitutional in funding, as in other contexts."[122]

Of course, viewpoint discrimination is permissible when the government transmits its own messages or "when it enlists private entities to convey [the government's] own message."[123] For example, the government may spend public money to encourage other nations to embrace democracy and liberty without thereby being "constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism."[124] However, this distinction does not support Chief Justice Rehnquist's conclusory judgment in *Davey*.[125]

Davey is not a case, like *Rust v. Sullivan*[126] or *United States v. American Library Ass'n*,[127] in which the government is funding the dissemi-

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[115] *Rosenberger*, 515 U.S. at 829.

[116] *Id.* at 831 ("[I]t must be acknowledged [that] the distinction is not a precise one.").

[117] *See supra* text accompanying notes 12–22, 30–101 for a discussion of the *Davey* and *Rosenberger* decisions.

[118] *Rosenberger*, 515 U.S. at 831.

[119] *Id.*

[120] Locke v. Davey, 540 U.S. 712, 717 (2004).

[121] *See Rosenberger*, 515 U.S. at 831 ("[V]iewpoint discrimination is the proper way to interpret the University's objections . . . . The prohibited [religious] perspective, not the general subject matter, resulted in the refusal to make third-party payments . . . ."); *see also* Dokupil, *supra* note 37, at 340 (arguing that in *Davey*, Washington State "first singled out 'theology,' then interpreted that word even more narrowly to single out that subset of theology majors who actually believe the material").

[122] *Rosenberger*, 515 U.S. at 830 (citation omitted).

[123] *Id.* at 833.

[124] Rust v. Sullivan, 500 U.S. 173, 194 (1991).

[125] *See* Laycock, *supra* note 34, at 194 ("The subsidized speech was private for purposes of this distinction for the same reason that funding would have been permissible: Davey's choice of major was not state action." (citation omitted)).

[126] *Rust*, 500 U.S. 173.

[127] 539 U.S. 194 (2003).

nation of its own message[128] or selecting, for circulation in a public library, books or other materials "of requisite and appropriate quality for educational and informational purposes."[129] If the State of Washington had decided not to fund the study of devotional theology at a state university or public school, that would be an example of the state deciding on the content of its own speech. The Promise Scholarship Program in *Davey*, however, was designed to facilitate "the independent and *private* choice of recipients" regarding the courses of study they wished to pursue at any public or private college, as the Court itself admitted when it concluded that the Program was clearly permissible under the Establishment Clause.[130]

It seems that Footnote Three of the Rehnquist opinion in *Davey* is difficult to justify. Is there any possible reading of the opinion that might save it from incoherence?

Is it possible that Chief Justice Rehnquist believed that the Promise Scholarship Program did not discriminate on the basis of viewpoint, but rather on some other, legitimate basis? In *Regan v. Taxation with Representation of Washington*, for instance, the Court held that the denial of tax-exempt status to a non-profit corporation organized to promote its view of federal tax policy did not violate the First Amendment because it was a result of Congress's viewpoint neutral policy of refusing to subsidize lobbying.[131] Similarly, in *Arkansas Educational Television Commission v. Forbes*, the Court held that a public television broadcaster's decision to exclude a candidate from a televised debate because he had negligible public support was a "reasonable, viewpoint-neutral" decision and thus consistent with the First Amendment.[132] Perhaps Chief Justice Rehnquist saw an analogous viewpoint-neutral basis for the exclusion of devotional theology majors from the Program. In other words, perhaps he understood the exclusion of "devotional theology majors" from the Program as a proxy for "the class of students training to become professional

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[128] *See Rust*, 500 U.S. at 193 ("[T]he Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.").

[129] *Am. Library Ass'n*, 539 U.S. at 211. *American Library Ass'n* is a case about government's power to control its own speech by making decisions about "collection acquisition . . . by public libraries, including acquisition decisions accomplished by blocking certain Internet sites." Manns, *supra* note 101, at 680. In addition, the decision stands for the idea that "government need not be neutral toward pornography." Berg & Laycock, *supra* note 58, at 236 n.62. As the Court itself made the point: "Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs [for public libraries]." *Am. Library Ass'n*, 539 U.S. at 212.

[130] Locke v. Davey, 540 U.S. 712, 719 (2004) (emphasis added).

[131] 461 U.S. 540, 546 (1983) ("Congress has not infringed any First Amendment rights . . . . Congress has simply chosen not to pay for . . . lobbying.").

[132] 523 U.S. 666, 683 (1998).

clergy," i.e., as an exclusion defined not by the viewpoint of the major, but by the likely clerical vocations of students who pursue such a course of study.

This reading of the opinion, however, creates problems of its own. First, it does not square with the clear facts of *Davey*, because it is indisputable that the exclusion was triggered by the viewpoint from which theology was taught, and not by the career goals of students.[133] Davey was excluded from the Program only because he chose to study theology from a devotional or believing perspective.[134] Moreover, using devotional theology as a proxy for the class of students studying for the priesthood or the clergy is both overinclusive and underinclusive. It is overinclusive because some devotional theology majors do not pursue ecclesiastical careers;[135] and it is underinclusive because, undoubtedly, some students who major in "non-devotional" theology or in some other subject *do* end up serving as professional clerics.[136] Under the First Amendment, the State of Washington may not achieve the goal of denying scholarships to students studying for ecclesiastical careers by discriminating against private educative speech on the basis of viewpoint.

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[133] *Davey*, 540 U.S. at 717 (describing the administration of the scholarship program); *see also* Declaration of Eugene Webb, *supra* note 19, at 85 (discussing the University of Washington's policy of teaching about religion exclusively from a "historical and . . . scholarly point of view").

[134] *See Davey*, 540 U.S. at 717 (stating that in order to receive his Promise Scholarship funds, Davey was required to certify that he was not pursuing a "devotional theology degree").

[135] Just as all English literature majors do not become English teachers or professional novelists or poets, not all devotional theology majors become professional clerics. Joshua Davey himself is a perfect example. Davey attends Harvard Law School and he intends to use his legal education to continue "the fight for religious freedom and equal access to education." Joshua Davey, *Faith in the Law*, 4 EDUC. NEXT 84 (2004).

[136] *See* Dokupil, *supra* note 37, at 355 ("Further, ministry students may not necessarily major in theology. The formulaic exclusion of theology majors does not functionally protect the taxpayer's conscience in the manner the state intended."); *see also* Berg & Laycock, *supra* note 58, at 230 n.18 ("The Court never justified its step of equating devotional theology majors with future clergy. Devotional theology majors may be the best available proxy for prospective clergy, because asking students directly whether they plan to become clergy is both intrusive and likely to produce some inaccurate answers and predictions. But the fact that the question would be intrusive is an indicator of the inappropriateness of singling out clergy students for exclusion from the program.").

In addition, some denominations may be more likely than others to employ priests and pastors who have studied theology from a non-devotional perspective. Thus, the distinction in the Promise Scholarship Program between devotional and non-devotional theology majors raises serious questions about impermissible denominational discrimination under the Establishment Clause. *See* Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

C. *What Goes Around, Comes Around: Scholarship Restrictions Based upon Secular Viewpoints and Footnote Three*

I believe Chief Justice Rehnquist's unreasoned dictum in Footnote Three of *Davey* is unsupportable under the Court's free speech jurisprudence; it should be rejected by the Court when the question is actually presented in a future case. However, if Footnote Three becomes law, then it is not only religious viewpoints that are at risk of suppression from restrictions in government scholarship programs for higher education.

For example, a scholarship program that funds all majors "except gender studies from a feminist perspective" should fare no better than one that excludes "devotional theology majors." This is true for two reasons. First, it is true because the Court has explicitly held, in *Capitol Square Review & Advisory Board v. Pinette*,[137] that "private religious speech . . . is as fully protected under the Free Speech Clause as secular private expression."[138] Second, it is also true because Chief Justice Rehnquist's dictum in Footnote Three does not state a special rule permitting funding restrictions on private religious speech, but instead merely proclaims that the Free Speech Clause is inapplicable because a scholarship program "is not a forum for speech."[139] If a scholarship program is not a forum for speech, then it is not a forum regardless of whether the funding restrictions exclude religious viewpoints or secular viewpoints; the Free Speech Clause is simply inapplicable.[140]

Although it might be argued that the Establishment Clause sometimes *requires* states to disfavor private religious expression,[141] that argument does not support reading Footnote Three as applying only to scholarship restrictions on religious majors, because it is clear that it is permissible under the Establishment Clause for states to include devotional theology majors under scholarships like Washington's Promise Program.[142] The issue here is whether the Free Speech Clause *permits* states to single out religious expression for less (or more) protection than the religion clauses require. In other words, this issue arises only when a state provides more disestablishment of

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[137] 515 U.S. 753 (1995).

[138] *Id.* at 760 (citations omitted).

[139] *Davey*, 540 U.S. at 720 n.3.

[140] *But see supra* notes 86–111 and accompanying text (explaining why a scholarship program is indeed a forum for speech).

[141] *Pinette*, 515 U.S. at 761–62 ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on [religious] speech." (citations omitted)).

[142] *See Davey*, 540 U.S. at 719 ("[T]here is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology.").

private religious speech than the Establishment Clause mandates, or more protection of private religious speech than the Free Exercise Clause provides.

Thus, when state law provides greater protection for the free exercise of religion than the Free Exercise Clause would provide under *Smith* and *Lukumi*, "the question arises whether . . . individuals engaged in religiously-motivated expression must be granted exemptions from content-neutral speech regulations that would be constitutionally applied to other speakers expressing secular messages."[143] Suppose, for example, that a city enacts a constitutionally permissible ordinance prohibiting all targeted residential picketing; and suppose further that a person engaged in religiously-motivated residential picketing seeks a preferential accommodation under a state law protecting religious liberty even against burdens imposed by laws of general application.[144] Would it violate the Free Speech Clause for state courts to grant this exemption? Professor Brownstein argues persuasively that "[g]ranting an exemption from content-neutral speech regulations for religiously motivated expression would violate . . . the Free Speech Clause," because allowing religious residential picketing while prohibiting secular residential picketing "would constitute content and viewpoint discrimination prohibited by the Free Speech Clause."[145] Brownstein concludes that "[a]ccordingly, neither the state nor any of its agencies or political subdivisions can provide religiously motivated speech immunity from regulatory requirements that are applied to secular speakers and speech."[146]

Brownstein's argument is powerful, and it applies with equal force to the opposite side of the coin: neither may a state nor any of its agencies or subdivisions provide secular speakers and speech immunity from regulatory requirements that are applied to religious speakers and speech. Michael McConnell has captured the governing principle lucidly:

> Finally, in the context of both regulation *and spending*, it is necessary to take into consideration other constitutional values that may be at stake in particular cases. A clear example of this idea is religious speech. It is undoubtedly true that speech is a component of religious exercise, however, when a conflict centers on the right of free speech, the proper re-

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[143] Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605, 609 (1999). The converse issue is presented when state law mandates more disestablishment of private religious speech than required under the Establishment Clause. In this case, the question is whether other speakers expressing secular messages may be granted expressive opportunities from which individuals engaged in religious expression are excluded.

[144] *See, e.g., id.* at 609–10 (explaining how a religiously-motivated protestor of abortion might be more protected under state law than a secular protestor at the same location).

[145] *Id.* at 643.

[146] *Id.*

> sult is affected by the content and viewpoint neutrality requirements of the Free Speech Clause. Thus, whether religious claimants are seeking special treatment, or seeking equal access to a public forum or its financial equivalent, the governing principle will be one of equal treatment, not of accommodation *or of separation.* Favoring religious speakers over similarly situated nonreligious speakers [or nonreligious speakers over similarly situated religious speakers] would violate the viewpoint-neutrality requirement of the Free Speech Clause.[147]

The bottom line is that whatever free speech rules govern discriminatory exclusion of religious viewpoints from generally applicable scholarship and other funding programs will also govern the exclusion from such programs of secular viewpoints. Students who are excluded from a scholarship program because they are pursuing a major in gender studies from a feminist perspective will fare no better and no worse under the Free Speech Clause than Joshua Davey and devotional theology majors.

CONCLUSION

In *Locke v. Davey*, the Supreme Court was confronted with a state scholarship program that targeted a small religious minority—students who major in theology from a devotional or believing perspective—for discriminatory exclusion from scholarship funding. Although the question presented to the Supreme Court was limited to Davey's free exercise claim, Chief Justice Rehnquist's majority opinion contains dictum also purporting to dispose of issues concerning unconstitutional viewpoint discrimination under the Free Speech Clause.[148]

The Court's free exercise decision, although extremely narrow and explicitly limited to "the Promise Scholarship Program as currently operated by the State of Washington,"[149] is troubling because it allows a state to target a small group of religious students for exclusion from a scholarship program open to all other students and all other courses of study. The Court seems to be saying that Davey was seeking too much too soon, by asking the Court to declare that equal treatment for devotional theology students in scholarship funding was not only permissible under the Establishment Clause, but required under the Free Exercise Clause. Thus, the Court held that, at least for the present, there must be room for "play in the joints" between the Establishment and Free Exercise Clauses for the states to decide whether to use tax funds for the vocational training of the

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[147] Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 40 (2000) (emphasis added) (citations omitted).

[148] Locke v. Davey, 540 U.S. 712, 720 n.3 (2004).

[149] *Id.* at 725.

clergy.[150] This Article speculates that, in the fullness of time, *Davey* will probably be understood as a narrow and temporary pause on the Court's inexorable journey toward neutrality under the religion clauses.

The primary focus of this Article has been on free speech issues that were technically not within the question presented to the Court in *Davey*. In brief and largely unreasoned dictum in Footnote Three of his majority opinion, Chief Justice Rehnquist rejected Davey's contention that the exclusion of devotional theology majors from the Promise Scholarship Program was an "unconstitutional viewpoint restriction on speech."[151] The Court asserted that the Promise Scholarship Program was "not a forum for speech," because its purpose was to help needy families pay for college, not to "encourage a diversity of views from private speakers."[152] Thus, the Free Speech Clause does not even apply to viewpoint-based exclusions from government funding of scholarships for postsecondary education.

Under *Rosenberger v. Rector & Visitors of University of Virginia*[153] and *Legal Services Corp. v. Velazquez*,[154] government may not discriminate on the basis of viewpoint in the context of a funding program if the program is designed "to encourage a diversity of views from private speakers"[155] or "to facilitate private speech, not to promote a governmental message."[156] Viewpoint discrimination is strongly disfavored under the Free Speech Clause, even in the context of funding programs, because it strikes at the core of the First Amendment's most basic values. This is particularly true when the viewpoint discrimination attacks intellectual freedom in the marketplace of ideas that exists in our colleges and universities.

This Article analyzed Chief Justice Rehnquist's Footnote Three dictum, and concluded that the Promise Scholarship Program in *Davey* was clearly designed to encourage Promise Scholars to choose from an infinitely broad array of subjects, viewpoints, and courses of study that make up the marketplace of ideas of higher education in the State of Washington. Since the exclusion of devotional theology majors from the Program was clearly based on the viewpoint from which theology is taught and studied, and since it is clear that government may not discriminate on the basis of viewpoint—even in the context of a funding program—if the program is designed to encour-

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[150] *See id.* at 718–19 ("[T]here are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause.").

[151] *Id.* at 720 n.3.

[152] *Id.*

[153] 515 U.S. 819 (1995).

[154] 531 U.S. 533 (2001).

[155] *Rosenberger*, 515 U.S. at 834.

[156] *Velazquez*, 531 U.S. at 542.

age a diversity of views from private speakers or to facilitate private speech, it follows that the Court's unreasoned dictum in *Davey* is difficult to support and should not be allowed to harden into law.

However, if Chief Justice Rehnquist is right—and I am wrong—about the constitutionality of viewpoint discrimination in scholarship programs, then it is important to recognize that it is not only religious viewpoints that may be targeted by government scholarship programs for higher education. Other unpopular or controversial majors—gender studies from a feminist perspective, for example—should fare no better than devotional theology majors under Chief Justice Rehnquist's dictum in Footnote Three. If the dictum in *Davey* becomes law, everyone who values the university as a haven for free intellectual inquiry will lose, because viewpoint discrimination in scholarship funding programs severely distorts the academic marketplace of ideas in colleges and universities. When the government broke its promise to Joshua Davey, it also broke faith with everyone who values religious liberty and intellectual freedom.